

States Court of Appeals for the Fourth Circuit. CA4 No. 11-6989.

Petitioner styles the instant motion, submitted on a pre-printed § 2255 form motion as an “Actual Innocence Claim under 28 U.S.C. § 2255” and instructs “DO NOT CONSTRUE AS A SECOND OR SUCCESSIVE § 2255 PLEADING THAT REQUIRES A CERTIFICATE OF APPEALABILITY TO PROCEED.” ECF No. 96, Cover Sheet.

II. Discussion

A self-represented litigant may not evade the procedural requirements for successive § 2255 motions by attaching other titles to a motion. *See United States v. Winestock*, 340 F.3d 200, 203 (4th Cir. 2003) (citing *Calderon v. Thompson*, 523 U.S. 538, 553 (1998)). In this motion, Brown is challenging whether a predicate offense was properly used to enhance his sentence and also blaming his attorney for ineffective representation by failing to conduct an adequate investigation. ECF No. 96, Ex. 1; *Id.*, Ex. 2, at 2. Under these circumstances, Brown is clearly attempting to challenge his sentence and raise a claim of ineffective assistance of counsel. As such, his claims are properly considered by way of a second or successive motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255. *See In re Vial*, 115 F.3d 1192, 1194 (4th Cir. 1997) (en banc) (“Those convicted in federal court are required to bring collateral attacks challenging the validity of their judgment and sentence by filing a motion to vacate sentence pursuant to 28 U.S.C.A. § 2255.”); *see also Castro v. United States*, 540 U.S. 375, 381–82 (2003) (citations omitted) (stating that a court may recharacterize a motion filed by a self-represented litigant “to create a better correspondence between the substance of a pro se motion’s claim and its underlying legal basis”). Petitioner provides no factual or legal basis to review the

motion under any other grounds.

Successive motions under § 2255 may not be filed absent leave to do so from the Court of Appeals. *See* 28 U.S.C. §§ 2244(b)(3)(A), 2255; *Burton v. Stewart*, 549 U.S. 147, 152 (2007). Since Brown does not indicate whether he has complied with the procedural requirements for a successive petition, the instant motion will be dismissed without prejudice for lack of jurisdiction.³

III. Certificate of Appealability

This motion provides no grounds for issuance of a certificate of appealability (“COA”). A prisoner seeking a motion to vacate has no absolute entitlement to appeal a district court’s denial of his motion. *See* 28 U.S.C. § 2253(c)(1). “A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” *Id.* § 2253(c)(2). The defendant “must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong,” *Tennard v. Dretke*, 542 U.S. 274, 282, (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that “the issues presented were ‘adequate to deserve encouragement to proceed further,’” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack*, 529 U.S. at 484).

Where, as here, a district court dismisses a habeas petition solely on procedural grounds, a certificate of appealability will not issue unless the petitioner can “demonstrate both (1) ‘that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right’ and (2) ‘that jurists of reason would find it debatable whether the district

³ An information packet for requesting pre-filing authorization will be sent to petitioner.

court was correct in its procedural ruling.’” *Rose v. Lee*, 252 F.3d 676, 684–85 (4th Cir. 2001) (quoting *Slack*, 529 U.S. at 484). Denial of a certificate of appealability does not prevent petitioner from seeking permission to file a successive petition or pursuing his claims after obtaining such permission. Brown may seek redress by filing a Motion to Vacate, Set Aside or Correct Sentence after obtaining the requisite pre-authorization from the United States Court of Appeals for the Fourth Circuit. An order consistent with this memorandum follows.

August 14, 2012

Date

_____/s/_____
Catherine C. Blake
United States District Judge